SUPREME COURT, U. S.

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JOHN F. DAVIS, CLE

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1153

JOHN P. O'CONNOR,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Ohio.

JAMES W. COWELL,
362 Spitzer Building,
Toledo, Ohio 43604,
Counsel for Petitioner.

RAYMOND S. METZGER, JR.,
810 Edison Building,
Toledo, Ohio 43604,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8647

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PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States and Associate Justices of the United States:

Petitioner, John P. O'Connor, respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of Ohio denying said petitioner's motion to correct the mandate issued out of the Supreme Court of Ohio on the 14th day of December, 1966, so that it would in all respects conform to and be consistent with the order rendered by and issued out of this Supreme Court of the United States on November 14, 1966, *O'Connor v. Ohio*, 385 U. S. 92. The opinion of this Court and the mandate issued in accordance therewith are appended hereto at pages 10 to 12, *infra*.

OPINIONS BELOW.

The Supreme Court of the State of Ohio did not render a written opinion. The judgment order of the Supreme Court of Ohio as issued on December 14, 1966 and the mandate in conformity therewith on the same date to the Common Pleas Court of Lucas County are produced in the appendix hereto (pp. 13-14, *infra*).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 1257 (3). Petitioner's motion to correct the mandate of the Supreme Court of Ohio was overruled by that court on November 9, 1967, and rehearing of this order was denied on November 29, 1967. Said orders are included in the appendix hereto (p. 14, *infra*).

QUESTION PRESENTED.

Did the Supreme Court of Ohio by its mandate to the Common Pleas Court of Lucas County, Ohio circumvent the decision and order of the Supreme Court of the United States in *O'Connor vs. Ohio*, 385 U. S. 92, 17 L. Ed. 2 page 189, 87 S. Ct. 252, by denying this petitioner's motion that sought complete conformance of the Supreme Court of Ohio mandate with the decision and order of the Supreme Court of the United States in *O'Connor vs. Ohio, supra?*

CONSTITUTIONAL PROVISION INVOLVED.

Constitution of the United States, Fourteenth Amendment.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

On December 13, 1965 the Supreme Court of the United States vacated the judgment of the State of Ohio which had affirmed Petitioner's conviction for larceny in *O'Connor vs. Ohio,* 382 U. S. 286 and remanded said cause for further proceedings in light of *Griffin vs. California,* 380 U. S. 609. Following remand, the Supreme Court of Ohio refused to follow the order of the Supreme Court of the United States. Again, petitioner sought review of his said cause in the Supreme Court of the United States. On November 14, 1966 the Supreme Court of the United States on review of said cause again reversed the judgment of the Supreme Court of Ohio and in the last paragraph of their per curiam opinion said, "We therefore grant the petition for certiorari and reverse the judgment of the Supreme Court of Ohio. *It is so ordered.*"

Then the said Supreme Court on the 9th day of December, 1966 issued its order to the Supreme Court of Ohio to reverse the judgment in this cause and awarded costs in the amount of One Hundred and no/100 Dollars ($100.00) expended in the Supreme Court of the United States to be recovered from the State of Ohio. The court

order further states that the cause was remanded to the Supreme Court of the State of Ohio for further proceedings not inconsistent with the opinion of the Supreme Court of the United States. The order further stated "The cause is remanded to you (Supreme Court of Ohio) in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the constitution and laws of the United States, the said writ notwithstanding."

On December 14, 1966 the Supreme Court of the State of Ohio stated in their journal that the judgment of the Supreme Court of Ohio confirming the judgment of the Court of Appeals for Lucas County was to be vacated and set aside and then said Supreme Court of Ohio proceeded to reverse the Court of Appeals' order and remanded the cause to the Court of Comomn Pleas for further proceedings not inconsistent with the opinion of the Supreme Court of the United States. The journal continues and ordered the appellant-petitioner herein to recover from the State of Ohio his costs as taxed on the mandate from the Supreme Court of the United States—and then further stated that petitioner-appellant, as far as his costs were concerned in the Supreme Court of Ohio, the Court of Appeals and the Court of Common Pleas, would have to abide the final judgment and further ordered a mandate be sent to the Court of Common Pleas to carry this additional and further judgment into execution. On that same date, December 14, 1966, a mandate in Cause 39119 was issued to the Common Pleas Court of Lucas County, Ohio stating as follows:

> "The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

"Pursuant to the order of the Supreme Court of the United States, it is ordered and adjudged that the judgment of this Court on May 25, 1966 be, and the same hereby is, set aside. It is further ordered that the judgment of the Court of Appeals for Lucas County be, and the same hereby is, reversed and the cause remanded to the Court of Common Pleas for further proceedings not inconsistent with the opinion of the Supreme Court of the United States."

On June 15, 1967, after attempts to obtain an explanation of the intent of the order as issued by the Supreme Court of Ohio, a motion and brief in support of said motion was prepared and forwarded to the Clerk of the Supreme Court of Ohio. The motion briefly stated "move the Supreme Court of Ohio to make its order and mandate conform in all respects to the order issued out of the Supreme Court of the United States in December of 1966." After a delay of two months and several letters to the Supreme Court of Ohio, the Clerk thereof finally filed the motion on the 17th day of August, 1967, as requested on June 15, 1967. On November 9, 1967 the Chief Justice of the Supreme Court of Ohio placed the following entry on the court's journal: "Upon consideration of the motion filed by counsel for appellant to correct this Court's mandate issued from this office on December 14, 1966, it is ordered by this Court that the motion be overruled."

Upon receipt of the said order, petitioner-appellant filed a motion for rehearing on the 15th day of November, 1967. On November 29, 1967 the Supreme Court of the State of Ohio denied the rehearing in this cause to correct its mandate and on the 24th day of January, 1968 notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Ohio.

ARGUMENT.

The judgment of the Supreme Court of Ohio in overruling petitioner's motion to correct the said Ohio Supreme Court's mandate and the denial of rehearing on said motion are the final steps necessary to exhaust petitioner's attempt to obtain redress of the improper order from the Supreme Court of Ohio. It is this order which circumscribes the decision and mandate issued by the Supreme Court of the United States in *O'Connor vs. Ohio,* 385 U. S. 92, *supra.*

The point of dispute and question is raised in the order issued from the Supreme Court of Ohio in adding to its order the following: "and his costs expended in this Court, the Court of Appeals and Court of Common Pleas shall abide the final judgment"; it would appear from reading the opinion of the Supreme Court of the United States and its order thereon to the Supreme Court of Ohio that this additional wording by the Supreme Court of Ohio is an attempt to usurp the authority of the Supreme Court of the United States and circumscribe the decision and mandate out of that said Supreme Court. A careful reading of the Supreme Court of the United States's decision and order appears to require the Supreme Court of Ohio to reverse the conviction and order the lower courts to do likewise. It would further appear that with the order to the State of Ohio to pay back to the petitioner herein his costs as they were incurred in the Supreme Court of the United States is an attempt to finally determine the cause of action once and for all and is a requirement that the Supreme Court of Ohio likewise order costs as expended by this petitioner in all lower courts returned to him by the various clerks of the various courts.

In the past when costs have been ordered returned to a party in a cause of action it has always been con-

sidered that the cause is finally finished and the party to whom the costs are ordered returned is considered to have won the case and had the decision finally rendered in his favor. A careful perusal of the order and opinion shows that this type of order is one in the nature of a direction or directive to cause certain clerical entries to be made and to be ordered made from the Supreme Court of Ohio to the proper appellate Court and likewise in turn to the proper common pleas court, each in its own jurisdiction being required to reverse the conviction and pay back the costs expended. As pointed out heretofore it appears that the Supreme Court of Ohio by adding the additional wording has retained and extended its jurisdiction so as to defeat the order and intent of the Supreme Court of the United States. The clerical procedure that appears to have been ordered by the Supreme Court of the United States would not require any further proceedings of any nature in any Court and the defendant would and should be discharged. It is a long established rule that the Supreme Court of the United States has authority to compel a court to comply with its mandate. See *Martin vs. Hunter* (U. S.), 1 Wheat. 304, 4 L. Ed. 97 (1816). The court's attention is also called to the case of *Fisher vs. Hurst,* 1948, 333 U. S. 147, 92 L. Ed. 604, which held "that where a state court, in making an order pursuant to a mandate of the Supreme Court of the United States, has retained jurisdiction over any question which might arise concerning compliance with the order, any question as to whether the order was being disobeyed was to be determined by the state court in the first instance before resorting to the Supreme Court of the United States for a writ to compel compliance with its mandate." It appears that the petitioner herein has tried to determine through the state court that the United States Supreme Court order was

being disobeyed only to be rebuffed in his attempt with only resort to the Supreme Court of the United States now being available to him.

The Supreme Court of the United States in a more recent decision in the case of *Cascade Natural Gas Corporation vs. El Paso Natural Gas Co.*, 386 U. S. 129, 17 L. Ed. 2nd 814 (1967), said that no court or even a department of the Federal Government has authority by stipulation or otherwise to circumscribe the power of the courts to see that the U. S. Supreme Court's mandate is carried out since only the Supreme Court of the United States has power or authority to alter or modify its mandate. The Supreme Court of Ohio had its attention called to the error in its order, but it refused to review its order, without opinion, requiring petitioner to seek help from the Supreme Court of the United States to compel compliance with its mandate.

CONCLUSION.

The cases herein set forth reflect the attitude and prior holdings of the Supreme Court of the United States in regard to its mandate and orders. Always when a state court of last resort disobeys or errs in interpreting an order from the Supreme Court of the United States said Supreme Court of the United States will compel compliance with its mandate. This situation appears to be required here and it is compliance with the mandate of the Supreme Court of the United States by the Supreme Court of Ohio that is sought. Petitioner has exhausted all of his principal appeals in the State court in an attempt to obtain compliance with the mandate from the Supreme Court of the United States. He has failed to obtain such compliance and, therefore, seeks redress through this Supreme Court of the United States.

Respectfully submitted,

JAMES W. COWELL,
RAYMOND S. METZGER, JR.,
Attorneys for the Petitioner,
John P. O'Connor.

APPENDIX.

OPINION OF THE SUPREME COURT OF THE UNITED STATES IN O'CONNOR v. OHIO, 385 U. S. 92.

(No. 477. Decided November 14, 1966.)

PER CURIAM.

This is the second time petitioner has come before this Court with the claim that the prosecutor's comment upon his failure to testify during his trial for larceny violated the constitutional right to remain silent. In *O'Connor v. Ohio*, 382 U. S. 286, we considered this contention when we granted certiorari, vacated the conviction and remanded the case to the Supreme Court of Ohio for further proceedings in light of our decision in *Griffin v. California*, 380 U. S. 609. Following remand, the Ohio court by a closely divided vote upheld petitioner's conviction solely on the ground that he failed to object to the proscribed comment at his trial and during his first appeal in the state courts. That failure was held to preclude the Ohio appellate courts from considering the claim that petitioner's federal constitutional rights had been infringed.

The State does not contest the fact that the prosecutor's remarks violated the constitutional rule announced in *Griffin*. Moreover, it is clear the prospective application of that rule, announced in *Tehan v. Shott*, 382 U. S. 406, does not prevent petitioner from relying on *Griffin*, since his conviction was not final when the decision in *Griffin* was rendered. Indeed, in *Tehan* we cited our remand of petitioner's case as evidence that *Griffin* applied to all convictions which had not become final on the date of the *Griffin* judgment. 382 U. S., at 409, n. 3. Thus, the only issue now before us is the permissibility of invoking the Ohio procedural rule to defeat petitioner's meritorious federal claim.

We hold that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. Recognition of the States' reliance on former decisions of this Court which *Griffin* overruled was one of the principal grounds for the prospective application of the rule of that case. See *Tehan v. Shott*, 382 U. S. 406, 417. Defendants can no more be charged with anticipating the *Griffin* decision than can the States. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when *Griffin* was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court.

We therefore grant the petition for certiorari and reverse the judgment of the Supreme Court of Ohio.

It is so ordered.

MANDATE OF THE SUPREME COURT OF THE UNITED STATES.

(No. 477, October Term, 1966.)

To the Honorable the Judges of the Supreme Court of the State of Ohio.

WHEREAS, lately in the Supreme Court of the State of Ohio, there came before you a cause between the State of Ohio, plaintiff-appellee, and John P. O'Connor, defendant-appellant, No. 39119, wherein the judgment of the said Supreme Court was duly entered on the 25th day of May A. D. 1966, as appears by an inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1966, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 14, 1966, by this Court that the judgment of the said Supreme Court in this cause be reversed with costs, and that this cause be remanded to the Supreme Court of the State of Ohio for further proceedings not inconsistent with the opinion of this Court.

IT WAS FURTHER ORDERED that John P. O'Connor recover from the State of Ohio One Hundred Dollars ($100) for his costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the ninth day of December in the year of our Lord one thousand nine hundred and sixty-six.

/s/ JOHN F. DAVIS,
Clerk of the Supreme Court
of the United States.

ORDER OF THE SUPREME COURT OF OHIO ENTERED DECEMBER 14, 1966.

Thereupon this cause came on for further consideration on the opinion of The Supreme Court of the United States. On consideration whereof, it is ordered and adjudged that the judgment of this Court affirming the judgment of the Court of Appeals for Lucas County be, and the same hereby is vacated and set aside and it is now ordered and adjudged that the judgment of the Court of Appeals is reversed and the cause is remanded to the Court of Common Pleas for further proceedings not inconsistent with the opinion of The Supreme Court of the United States.

It is ordered and adjudged also that the appellant recover from appellee his costs as taxed on the Mandate from The Supreme Court of the United States and his costs expended in this Court, the Court of Appeals and Court of Common Pleas shall abide the final judgment; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

MANDATE OF THE SUPREME COURT OF OHIO DATED DECEMBER 14, 1966.

To the Honorable Common Pleas Court
Within and for the County of Lucas, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Pursuant to the Order of The Supreme Court of the United States, it is ordered and adjudged that the judgment of this Court of May 25, 1966, be, and the same

hereby is set aside. It is further ordered that the judgment of the Court of Appeals for Lucas County be, and the same hereby is, reversed and the cause remanded to the Court of Common Pleas for further proceedings not inconsistent with the opinion of the Supreme Court of the United States.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CORRECT MANDATE, ENTERED NOVEMBER 9, 1967.

Upon consideration of the motion filed by counsel for Appellant to correct this Court's mandate issued from this office on December 14, 1966, it is ordered by this Court that this motion be overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING, ENTERED NOVEMBER 29, 1967.

It is ordered by the court that rehearing in this case to correct mandate is denied.